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New Case Law of the Federal Supreme Court on Workplace-Related Incapacity for Work

The Federal Supreme Court recently rendered a landmark judgment on the legality of dismissals during a so-called workplace-related incapacity for work. At the heart of the ruling was the question of whether the blocking period protection set forth in Art. 336c of the Swiss Code of Obligations (CO) applies to workplace-related incapacities for work. The specific issue at hand was whether employees are protected from dismissal when their incapacity for work only prevents them from performing their current job duties, while they are not affected in their personal lives and could take on another job without restriction. Prior to this ruling, the Federal Supreme Court had not taken a clear position on this matter.

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Workplace-Related Incapacity for Work / Definition and Legal Consequences

A workplace-related incapacity for work occurs when an employee is unable to work solely in relation to their specific occupational role, while restrictions in other areas of life, such as leisure, hobbies, or vacation time, are minimal or non-existent. Typical examples include psychological stressors such as workplace bullying and job-related stress. To illustrate, an employee who develops depression as a result of a conflict with their supervisor may be unable to fulfil the duties of their current position. Nevertheless, it is conceivable that this individual, despite having a medical certificate, could still be sighted at the gym.

A number of questions arise with regard to the legal consequences of cases of workplace-related incapacity for work.

In the context of case law and doctrine, there is a general consensus that an employee who is unable to work due to illness or accident is entitled to receive salary for a limited period of time in accordance with the provisions set forth in Art. 324a CO. Such individuals are treated identically to employees who are unable to work due to illness, but whose illness is not workplace related. The pivotal consideration is whether the employee is capable of fulfilling the contractually defined duties.

Nevertheless, there was a divergence of opinion as to whether the statutory protection against dismissal also applied for a workplace-related incapacity for work.

The term "blocking period protection" refers to the temporal protection against dismissal as stipulated in the CO. The aforementioned protection is applicable in instances of illness or accident affecting employees, and the duration of the protection period is as follows: 30 days in the first year of employment, 90 days from the second to the fifth year, and 180 days from the sixth year onwards. In the event that the employer terminates the employment relationship prior to the commencement of the incapacity for work, the notice period is suspended during the blocking period and only resumes after the blocking period has concluded. Conversely, a termination that occurs during a blocking period is void and thus invalid (Art. 336c para. 2 CO).

This regulation is uncontroversial in cases of unintentional incapacity for work caused by illness or accident that extend to all areas of the employee's life. An illustrative example would be a case of influenza, which prevents the employee from fulfilling their professional obligations, enjoying their leisure time, or even taking a vacation.

It was previously unclear whether this protection extended to instances of workplace-related incapacity for work. While German-speaking courts have questioned the applicability of the blocking period protection in cases of workplace-related incapacity for work, French-speaking courts have largely maintained protection against dismissal during such instances.

The Federal Supreme Court's Decision

In its decision 1C_595/2023 of 26 March 2024, the Federal Supreme Court addressed the application of the blocking period protection during a notice period in cases of workplace-related incapacity for work. The case in question pertains to the termination of an employment contract by the employer, namely the Swiss Army, during the medically certified incapacity for work of a First Lieutenant. The employee contended that the dismissal occurred during the ongoing blocking period and was therefore invalid.

In its ruling, the Federal Supreme Court emphasized that the temporal blocking period protection was introduced with the objective of safeguarding employees from job loss at a time when they are unable to seek new employment due to their incapacity for work. Nevertheless, this protection, as set forth in Art. 336c CO, does not apply in the

aforementioned circumstances. This is the case when the inability to work is limited to the specific workplace. Consequently, the Federal Supreme Court determined that there is no protection against dismissal in cases of purely workplace-related incapacity for work.

This case law is limited to situations where the incapacity for work is strictly limited to the workplace. An illness is not considered to be purely workplace-related if, although it was triggered by factors related to the workplace, such as bullying, it affects the entire life of the employee and thus is not limited solely to the workplace. It would be erroneous, therefore, to infer from the recent Federal Supreme Court ruling that any incapacity for work arising in the context of a workplace conflict should be disregarded.

Evidence Challenges and Recommendations for Action

In the context of incapacity for work, the burden of proof is typically placed on the employee. This follows from general rules of evidence, which state that the individual who seeks to derive rights from an asserted fact must prove its existence. In the majority of cases, the employee will provide this proof in the form of a medical certificate. However, this can be challenged or contradicted by other factors and evidence.

In cases of incapacity for work in the workplace, however, it is commonly held in practice that the burden of proof lies with the employer. It is incumbent upon the employer to demonstrate that the incapacity is solely workplace-related, a task that is often challenging in practice.

In the event of uncertainty regarding the employee's incapacity for work or the suspicion of a workplace-related incapacity for work, the employer may request that the employee undergo an examination by a medical examiner. Such an examination can also be arranged through the daily sickness benefits insurance. It is recommended that the employer provide the medical examiner with a questionnaire prior to the examination, in order to ascertain (among other things) whether there is a workplace-related incapacity for work.

Nevertheless, even if a medical examiner diagnoses a workplace-related incapacity for work, the employee is at liberty to contest this and submit contradictory evidence. For instance, they can provide a medical certificate from a third physician. Ultimately, it is up to the judge to decide, based on the available documents, whether a workplace-related incapacity for work exists. For this reason, it is advisable to issue an additional precautionary notice of termination after the end of the hypothetical blocking period. This means a termination that will only take effect if a court unexpectedly declares the initial termination null and void.

Conclusion

In its judgement 1C_595/2023 of 26 March 2024, the Federal Supreme Court determined that the temporal protection against dismissal under Art. 336c CO is applicable in cases where the employee's health impairment is not severe enough to hinder them from taking up a new position. This provision is of particular relevance in cases of incapacity for work related to the workplace.

Consequently, an employer is entitled to terminate the employment contract with an employee who is incapacitated due to illness, provided that the incapacity is limited to the specific workplace.

Although the legal situation has now been clarified, there remain a number of practical questions and challenges. The handling of workplace-related incapacity for work or the termination of an employment relationship during such incapacity should be carefully analyzed and the approach chosen with due consideration in each individual case.

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